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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Center for Public Interest Law, University of San Diego School of Law, concerning License Fee Increase ordered by State Board of Chiropractic Examiners/1	No. 85-001 April 8, 1986 Determination Pursuant to Government Code Section 11347.5; Title 1, California Administrative Code, Chapter 1, Article 2

Determination by: LINDA STOCKDALE BREWER, Director

Herbert F. Bolz
Coordinating Attorney,
Rulemaking and Regulatory
Determinations Division

THE ISSUE PRESENTED/2

The Center for Public Interest Law, University of San Diego School of Law ("Center") has requested the Office of Administrative Law ("OAL") to determine whether or not the October 1982 decision of the State Board of Chiropractic Examiners ("Board") to raise the annual license renewal fee for chiropractors from sixty five dollars ($65) to seventy five dollars ($75) is an order or standard of general application which should have been adopted as a regulation and filed with the Secretary of State as required by the California Administrative Procedure Act ("Act")./3

THE DECISION/4

The Office of Administrative Law finds that the above noted order increasing the license renewal fee (1) is subject to the requirements of the Act, (2) is a "regulation" as defined in the Act, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the Act.

I. AGENCY AND AUTHORITY

The State Board of Chiropractic Examiners (hereinafter refered to as the "Board") was established by the Chiropractic Act, an initiative statute/5 originally approved by the voters in 1922./6 The Board is responsible for licensing chiropractors in California. Each licensed chiropractor is required by the above statute to pay an annual license renewal fee.

Chiropractic Act section 12.5 authorizes the Legislature to "by law fix the amounts of the fees payable by applicants and licensees..." (Emphasis added.) This language empowers the Legislature itself to set license fees directly--without the need to gain voter approval. However, the Legislature has not exercised this option to set fees by ordinary statute. Instead, that body has submitted to the voters a series of amendments to the initiative statute--amendments which, rather than fixing the amount with precision, simply set maximum levels for annual renewal fees.

At the time the Center originally submitted its Request for Determination, the Chiropractic Act provision in question, section 12, provided for "a renewal fee of not more than seventy five dollars ($75) as determined by the board." (Emphasis added.)/7

The Legislature (and the voters) have thus delegated to the Board the power to fix the precise renewal fee by regulation, not to exceed the stated maximum. See Government Code section 11346, quoted below, which states that the Act covers all statutorily conferred quasi-legislative powers.

Section 4(b) of the Act provides:

> "The board shall have power:
>
> . . . .
>
> (b) to adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work, the effective enforcement and administration of this act, the establishment of educational requirements for license renewal, and the protection of the public. Such rules and regulations shall be adopted, amended, repealed and established in accordance with the provisions of Chapter 4.5 [now Chapter 3.5]

(commencing with section 11371 [now 11340]) of Part 1 of Division 3 of Title 2 of the Government Code as it now reads or as it may be hereafter amended by the Legislature". (Emphasis added.) /8

Given the language emphasized above, there can be no doubt that the Legislature (and the voters) intended that the Board be fully subject to the Act, including the recently added Government Code section 11347.5. /9, /10

II. DISPOSITIVE ISSUES

There are three threshold inquiries/11 before us:

(1) Whether the issuance and enforcement of the informal rule constitutes an exercise of quasi-legislative power by the enforcing agency.

(2) Whether the informal rule is generally subject to the requirements of the Act.

(3) Whether the informal rule is a "regulation" within the meaning of Government Code section 11342.

FIRST, WE INQUIRE WHETHER THE "RULE" IS A RESULT OF THE EXERCISE OF THE BOARD'S QUASI-LEGISLATIVE POWERS.

Government Code section 11346 provides:

"It is the purpose of this article [Article 5 of Chapter 3.5] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." (Emphasis added.)

What is "quasi-legislative" power? The term "quasi-legislative" is not defined in the Act; thus, we turn to general principles of law. According to the California Court of Appeal:

"the term 'quasi' used as a prefix means 'analogous to' (Black's Law Dictionary (4th ed.)); or as 'having some

> resemblance (as in function, effect or status) to a given thing.' (Webster's Third New Internat. Dict.) Webster defines the term 'quasi-legislative' as 'having a partly legislative character by possession of the right to make rules and regulations having the force of law' and as 'essentially legislative in character but not within the legislative power or function or belonging to the legislative branch of government as constitutionally defined.' (Webster's Third New Internat. Dict.)" (Emphasis added.)/12/13

Clearly, the Board's decision to set the license renewal fee at $75 was quasi-legislative in nature--it was a general policy intended to be legally binding to all future licensees.

NEXT WE INQUIRE WHETHER THE INFORMAL RULE UNDER REVIEW IS GENERALLY SUBJECT TO THE REQUIREMENTS OF THE ACT.

This question is unequivocally answered in the affirmative by section 4(b) of the Chiropractic Act (quoted above). That section specifically makes Board "rules and regulations" subject to the provisions of the Administrative Procedure Act.

FINALLY, WE INQUIRE WHETHER THE INFORMAL RULE UNDER REVIEW IS A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(b) defines "regulation" as:

> "...every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.... 'Regulation' does not mean or include any form prescribed by a state agency or any instructions relating to the use of the form...." (Emphasis added.)

Government Code section 11347.5, /14 authorizing OAL to determine whether or not agency rules are "regulations", provides in pertinent part:

> "No state agency shall issue...any...order...which is a regulation as defined in subdivision (b) of section 11342, unless the...order...has been adopted as a regu-

lation and filed with the Secretary of State pursuant to this chapter.

Applying the definition found in Government Code section 11342(b) involves a two-part inquiry:

(a) is the informal rule either (i) a rule or order of general application or (ii) a modification or supplement to such a rule?

(b) does the rule being enforced either (i) implement, interpret or make specific the law enforced or administered by the Board or (ii) govern the Board's procedure?

The answer to both parts of this inquiry is "yes".

First, we find that the Board's order increasing the fee is a rule of general application--it applies, without exception, to all chiropractors throughout California who desire to retain their licenses. See Armistead v. State Personnel Board (rule governing withdrawal of state employees' resignations was rule of general application)/15; Stoneham v. Rushen (Stoneham II) and Stoneham v. Rushen (Stoneham I) (rules governing state prison inmate classification were rules of general application)/16; Faunce v. Denton (rules governing state prison inmate property were rules of general application)/17; Roth v. Department of Veteran Affairs (rule requiring Cal-Vet borrowers to pay late charge was rule of general application)/18. Cf. Faulkner v. California Toll Bridge Authority (resolution applying solely to one bridge was not a rule of general application)/19. For an agency rule to be deemed a rule "of general application", it does not have to apply to all Californians; it need only apply to all members of a class, kind or order. Roth/20.

Second, the fee increase order was made for the purpose of implementing or making specific Chiropractic Act section 12, which at the time of the challenged decision authorized the Board to set fees up to a maximum of seventy-five dollars ($75).

We conclude therefore that (1) the issuance and enforcement of the subject informal rule constitutes an exercise of quasi-legislative power by the Board; (2) the rule is subject to the requirements of the Administrative Procedure Act; and (3) the rule is a "regulation" within the meaning of Government Code section 11342.

III DOES THE BOARD ACTION FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION?

Disposing of the above threshold questions does not end our analysis, however. We note that rules concerning certain activities of state agencies are not subject to the requirements of the Act; these include:/21

1. Rules relating "only to the internal management of the state agency". Government Code section 11342(b).

2. Rules "directed to a specifically named person or group of persons and [that do] not apply generally throughout the state". Government Code section 11343(a)(3).

The Internal Management Exception--Government Code section 11342(b)

In discussing the "internal management" question, Armistead concluded that the resignation rule was not within the exception because it applied to all state civil service employees./22 The Stoneham I court found that the challenged inmate classification rule was not within the internal management exception, but rather that it was a rule of general application./23

Therefore, it is clear from Armistead, Stoneham I, and Stoneham II that policies which effect a class of persons rather than the employees of the originating agency do not fall within the internal management exception. According to Poschman v. Dumke, the "better reasoned view is to regard the 'internal management' [exception] so as to encompass [only] accounting techniques and the like"./24

The challenged Board decision affects a class of persons outside the staff of the Board: all chiropractors licensed in California. Payment of this fee is a condition to continued practice as a chiropractor in California. Thus, the challenged rule cannot be deemed to fall within the internal management exception.

The Exception for Specifically Named Persons or Groups of Persons--Government Code section 11343(a)(3)

The scope of this exception has not yet been definitively established in case law. The only case applying this exception has in substance been overruled by Armistead. The earlier case, American Friends Service Committee v. Procunier/25 held that rules pertaining to state prison

inmates were exempt from the Act because the rules were directed specifically "to a group of persons and [did] not apply generally throughout the state."

In 1976, the Legislature amended the Department of Corrections' rulemaking statute to require that Department to adhere to the Act./26 In 1978, the Armistead court held that the challenged State Personnel Board rule was invalid absent compliance with the Act -- despite the fact that the rule applied solely to a specifically named group of persons, i.e., California state civil service employees. /27 /28

Armistead held that the rule, even though it applied to a specific class of persons, nonetheless "applied generally throughout the state". This broad interpretation of what constitutes general application suggests that the section 11343(a)(3) exemption may only be invoked in that rare circumstance when an executive branch action applies to a group of persons, and does not apply generally throughout the state.

We conclude, therefore, that none of the statutory or judicial exceptions apply to the Board's order.

IV. CONCLUSION

For the reasons set forth above, the Office of Administrative Law finds that the above noted order increasing the license renewal fee (1) is subject to the requirements of the Act, (2) is a "regulation" as defined in the Act, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the Act.

Notes

/1 In this proceeding, Gene Erbin represented the Center for Public Interest Law. Executive Director Edward J. Hoefling represented the Board.

/2 California's Administrative Procedure Act ("Act"), originally proposed by Governor Earl Warren and adopted by the Legislature in 1945, has two prime objectives: meaningful public participation and effective judicial review. See California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 510, 131 Cal.Rptr. 744, 751. In 1979, major changes were made to the Act, notably the creation of the Office of Administrative Law (OAL). OAL was charged with the orderly review of regulations, which were required to be formally adopted by agencies. Such regulations do not become legally effective until reviewed and approved by OAL and filed with the Secretary of State. OAL has carried out its statutory mandates, reviewing not only new or newly amended post-1980 regulatory proposals, but also older regulations predating OAL's establishment.

Notwithstanding the legislative reforms of 1979, one category of agency regulatory activity continued to pose special problems. These were the so called "underground regulations" --requirements of a regulatory nature imposed upon the public by state agencies without first having been subject to public scrutiny and comment pursuant to the Act. Unlike ordinary regulations, such "informal rules" were not submitted to OAL for review prior to being imposed on the public by the agency.

California courts have struggled for years with the related questions of (1) which agency "rules" constituted an exercise of quasi-legislative power, (2) which "rules" were generally subject to the Act and (3) which were "regulations" within the meaning of Government Code section 11342.

Some decisions held that the "rules" in question did not constitute an exercise of quasi-legislative power:

> Agricultural Labor Relations Board v. California Coastal Farms, Inc. (1982) 31 Cal.3d 469, 183 Cal.Rptr. 231 (ALRB's substantive rules may be developed either through rulemaking--as exercise of quasi-legislative power--or through adjudication--as exercise of quasi-judicial power); Bendix Forest Products Corp. v. Division of Occupational Safety & Health (1979) 25 Cal.3d 465, 158 Cal.Rptr. 882 (order that company provide hand protection to employees was specific application of existing laws rather than exercise of quasi-legislative

power); Skyline Homes, Inc. v. Department of Industrial Relations (1985) 165 Cal.App.3d 329, 211 Cal.Rptr. 792 (upheld order that company pay overtime pursuant to agency Operations and Procedures Manual's interpretation of regulation; interpretation was permissible despite lack of compliance with the Act in light of agency's duty to enforce regulation and considering that the alternative interpretation was legally untenable); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 199 Cal.Rptr. 546. (considering that alternative interpretation of existing law was legally untenable, non-contractual requirement that Cal-Vet borrowers use purchase as principal place of residence validly applied statutory provision that purchase be used as "home" in which purchaser "actually resides"); California Coastal Commission v. Quanta Investment Corporation (1981) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (considering that alternative interpretation of existing law was legally untenable, Commission's assumption of jurisdiction over stock cooperative conversions was valid application of existing law rather than an exercise of quasi-legislative power).

Other decisions held that the "rules" in question were not subject to the Act:

Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (determination that certain workers were covered by prevailing wage laws was a part of the statutory process of setting wage rates and thus fell within the Act's exemption for regulations which set rates, prices or tariffs); In Re Setzer's Guardianship (1961) 192 Cal.App.2d 634, 13 Cal.Rptr. 683 (Department of Mental Hygiene's monthly rate for care of incompetent persons held to fall within the Act's exemption for regulations which set rates, prices or tariffs); State Compensation Insurance Fund v. McConnell (1956) 46 Cal.3d 330 (worker's compensation insurance premium rates held to fall within the Act's exemption for regulations which set rates, prices or tariffs); Alta Bates v. Lackner (1981) Cal.App.3d 614, 175 Cal.Rptr. 196 (special statutory provision exempted Health Services' Director from Act's requirements); American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22 (Legislature held not to have intended the Act to apply to state prison inmates where (1) Corrections' Director was authorized to prescribe prison rules and regulations

and to change them "at his pleasure" and (2) Act exempted regulations which were directed to a specifically named group of people and did not apply generally throughout the state).

In other decisions, "rules" were held not to be "regulations":

Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317 (Authority's resolutions concerning construction of Richmond-San Rafael Bridge were not "of general application" to any open class); City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 88 Cal.Rptr. 12 (sales tax allocation method was (1) merely an accounting technique which was in any event (2) part of a contract which plaintiff had signed without protest).

Yet other cases held certain "rules" to be invalid unless adopted pursuant to the Act:

Armistead v. State Personnel Board (1978) 22 Cal.3d. 198, 149 Cal.Rptr. 1 ("Personnel Transactions Manual" rule governing withdrawal of state employees' resignations); California Association of Nursing Homes, etc. v. Williams (1970) 4 Cal.Ap.3d 800, 84 Cal.Rptr. 590 (Changes to Medi-Cal "Schedule of Maximum Allowances" mandated by the Department of Finance) California Association of Nursing Homes, etc. v. Williams (1970) 4 Cal.App.3d 948, 85 Cal.Rptr. 735 (Medi-Cal "Schedule of Maximum Allowances"; California Medical Association v. Brian (1973) 30 Cal.App.3d 637, 106 Cal.Rptr. 555 ("Medi-Cal consultant guidelines" interpreting and supplementing regulations); City of San Marcos v. California Highway Commission, Department of Transportation (1976) 60 Cal.App.3d 383, 131 Cal.Rptr. 804, 816-821 (rule setting deadline for receipt of applications for state construction funds); Faunce v. Denton (1985) 167 Cal. App.3d.191, 213 Cal.Rptr. 122 (rules governing personal property of state prison inmates); Goleta Valley Community Hospital v. State Department of Health Services (1983) 149 Cal.App.3d 1124, 197 Cal.Rptr. 294 (agency letter erroneously reinterpreting Medi-Cal hospital reimbursement regulation); Ligon v. California State Personnel Board (1981) 123 Cal.App.3d. 583, 176 Cal.Rptr. 717 (rule governing treatment of certain work experience as prerequisite for promotion); Planned Parenthood v. Swoap (1985) 173 Cal.App.3d 1187, 219 Cal.Rptr. 664 (agency

statement narrowly interpreting Budget Act provision); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596 (rule giving university chancellor final decision in faculty tenure granting matters); Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d. 622, 167 Cal.Rptr. 552 (non contractual rule requiring Cal-Vet borrowers to pay late charges); San Diego Nursery Company, Inc. v. Agricultural Labor Relations Board (1979) 100 Cal.App.3d 128, 160 Cal.Rptr. 822 (policy granting ALRB agents unconsented access to employers' worksites for purposes of worker education); Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 180, 203 Cal. Rptr. 20 (rules supplementing a regulation governing state prison inmate classification); Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130 (rules governing state prison inmate classification). See Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132 (rules governing personal property of California state prison inmates).

The watershed case which authoritatively clarified the scope of the statutory term "regulation" was decided by the California Supreme Court in 1978. Armistead v. State Personnel Board, supra. See Asimow, Nonlegislative Rulemaking and Regulatory Reform, 85 Duke L.J. 381, 407 & 410 n.137 (1985).

In 1982, concerned about the ramifications of "underground regulations", the Legislature followed the holding of the Armistead case when it enacted AB 1013(McCarthy). That statute authorized OAL to determine whether informal rules of the type before the Armistead court, were in fact regulatory in nature and therefore unenforceable absent compliance with the Act. Since AB 1013 became law, subsequent case law developments have further clarified the question of which agency rules are subject to the Act.

Now, armed with statutory authorization and needed regulatory procedures (Title 1, California Administrative Code, Chapter 1, Article 2), OAL is issuing herein its first formal determination under Government Code section 11347.5. This and future determinations should help serve the Act's goals of meaningful public participation, effective judicial review, improvement of regulation quality, and reduction of regulation quantity.

/3 We refer to the portion of the Act which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the

Government Code. (Sections 11340 through 11356, Chapters 4 and 5, also part of the Act, do not concern rulemaking.)

/4 Despite reminders, the Board failed to file with its response the declarations required by Title 1, California Administrative Code (CAC), section 125(c) and (d). Given this fact, OAL is legally precluded from considering the Board's response in making its decision. See Title 1, CAC, section 125(f) (in making its determination, OAL shall not consider any response which does not comply with the requirements of this section.)

/5 According to California Constitution Art. 2, section 10(c), an initiative statute differs from an ordinary statute in one important respect. Unless the initiative statute itself provides otherwise, it may be amended or repealed by another statute only if the second statute is approved by the voters.

/6 The Chiropractic Act appears in West's Annotated California Business and Professions Code following section 1000, and in an appendix to Deerings California Business and Professions Code.

/7 The maximum level was raised from $75 to $150 by SB 286 (Statutes of 1983, Chapter 533, section 2) effective July 28, 1983.

/8 Section 4(b) was amended to read as it appears above in 1970 (Statutes of 1970, Chapter 643, p. 1261, section 1).

/9 The Act's procedural requirements (e.g., 45-day notice to the public of the proposed rulemaking action by publication in the California Administrative Notice Register) apply in addition to any other notice or review procedures that may legally or customarily apply to the agency action in question. See Government Code section 11346. Neither the rulemaking agency nor OAL has the authority to exempt particular agency actions from the Act on the grounds that, for instance, a state control agency has previously approved the action. See, e.g., California Association of Nursing Homes, supra, note 2, 4 Cal.App.3d at 815.

/10 Section 4(b) specifically states that the Board's rules and regulations must be adopted, amended, repealed and "established in accordance with the provisions of [the Act]" (emphasis added). Use of the word "established" in a statutory granting of rulemaking power is relatively unusual. In accord with standard principles of statutory interpreta-

tion, we are obliged to give due significance to this additional word. We read the inclusion of the word "established" as evidencing a legislative (and popular) intent that all of the Board's "rules and regulations" be subject to the requirements of the Act; that the Board is not free to "establish" license fees or any other rules or regulations by procedures that fail to meet the Act's criteria.

/11 See Faulkner, supra, note 2, 40 Cal.2d at 324 (points, 1 and 2) ALRB, 31 Cal.3d at 479 (point 1); cases cited in note 2.

/12 Hubbs v. California Department of Public Works (1974) 36 Cal.App.3d 1005, 1009, 112 Cal.Rptr. 172, 174.

/13 Certain agency rules or policies are clearly not quasi-legislative in character; for instance, when a rule reflects a statutory or regulatory requirement that has only one legally viable interpretation. Roth, supra, note 2; Nadler, supra, note 2.

/14 Statutes of 1982, Chapter 61, p. 195, section 1.

/15 Supra, note 2.

/16 Supra, note 2.

/17 Supra, note 2.

/18 Supra, note 2.

/19 Supra, note 2.

/20 Supra, note 2, 110 Cal.App.3d. at 631.

/21 The following provisions of law may also permit agencies to avoid the Act's requirements under some circumstances, but do not apply to the case at hand:

a. Rules that "establish[ ] or fix[ ] rates, prices or tariffs". Government Code section 11343(a)(1). See authorities cited in note 2, and OAL Disapproval Opinion of February 25, 1986, Notice Register 11-Z (March 14, 1986), pp. B-4--B-5.

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the

form is issued. Government Code section 11342(b); Stoneham I, supra, note 2.

c. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. Government Code section 11342(b).

d. Contractual provisions previously agreed to by the complaining party. Roth, supra note 2, Nadler, supra note 2.

/22 Supra, note 2, 22 Cal 3d at 205.

/23 Supra, note 2, 137 Cal.App. at 737.

/24 Supra, note 2 31 Cal. App 3d at 944. See City of San Joaquin, v. State Bd. of Equalization, supra note 2, 9 Cal. App. 3d at 376, 20; San Diego Nursery Company Inc. v. ALRB, supra note No.2, 99 Cal. App 3d at 142-143.

/25 Supra, note 2.

/26 Penal Code section 5058.

/27 Note, however, that Armistead did not specifically consider the application of Government Code section 11343(a)(3).

/28 See Stoneham I, supra, note 2 (invalidated rule which applied solely to state prison inmates); Faunce, supra, note 2 (same); Hillery, supra, note 2 (same).